United Nations AT/DEC/1144

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1144

Case No. 1241 MILLER Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Mayer Gabay, Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Susan Miller, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 1999, and periodically thereafter until 31 January 2002.

Whereas, on 31 January 2002, the Applicant filed an Application, requesting the Tribunal, inter alia:

"10. ... [T]o order that:

(a) [The] Applicant be reinstated for a further two-year term retroactive to the date of her separation from service, 24 October 1997.

(b) [The] Applicant be compensated two-years' net base salary base pay plus appropriate allowances, including [United Nations] Joint Staff Pension Fund contributions, for moral and material injuries suffered and the jeopardy to [her] professional career

11. [To provide documents and to hold a hearing]."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2002;

Whereas the Respondent filed his Answer on 31 May 2002;

Whereas the Applicant filed Written Observations on 10 October 2002;

Whereas, on 19 November 2002, the Respondent submitted an additional statement;

Whereas, on 7 November 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas, on 19 November 2003, the Respondent submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on a two-year fixed-term appointment as an Associate Proofreader, Conference Services Division, United Nations Office at Geneva (UNOG), at the P-2 level on 24 October 1993. The Applicant's appointment was extended for another two-year period expiring on 23 October 1997.

On 5 October 1995, the Applicant submitted a rebuttal to her performance evaluation report (PER) covering the period 24 October 1993 to 31 August 1995, questioning four "C" ratings. The Applicant finalized her selection of the members of the Rebuttal Panel in December 1997. In its report dated 10 May 1998, the Panel recommended upgrading all four ratings to "B". Subsequently, the Director, Conference Services Division, UNOG, accepted the Panel's recommendation and the Applicant's record was amended accordingly.

On 18 June 1997, the Applicant submitted a request for annual leave from 12 to 29 August 1997 which was approved on 19 June 1997. On 25 June 1997, the Applicant submitted a request for home leave, and, on 26 June, she requested that the period of her approved annual leave be considered as her 1997 home leave. On 4 July 1997, the Officer-in-Charge, Publishing Services, UNOG, advised the Deputy Chief, Personnel Administration Section, UNOG, that as the Applicant had less than six months before the end of her contract and her future contractual status had not yet been determined, her request for home leave had been approved on the understanding that, should her contract not be extended, she would be required to reimburse the costs of her home leave. On 8 July, the Applicant was so informed and was requested to confirm her agreement in writing, which she did, on 17 July.

On 5 September 1997, the Officer-in-Charge, Publishing Services, UNOG, informed the Personnel Administration Section, UNOG, that she did not intend to request the extension of the Applicant's fixed-term appointment due to expire on 23

October 1997. On 9 September 1997, the Applicant was informed that her fixed-term appointment would not be renewed.

On 7 October 1997, the Applicant requested the Secretary-General to review this decision.

On 9 October 1997, the Applicant filed before the Secretary of the Joint Appeal Board (JAB), a request for suspension of action.

On 15 October 1997, the Applicant submitted her case to the Panel on Discrimination and other Grievances, Geneva. On 16 October 1997, the Panel addressed a memorandum to the Director General, UNOG, recommending that the Applicant be granted a two-month extension in accordance with paragraph 15 of administrative instruction ST/AI/308/Rev.1 of 25 November 1983, to enable the Panel to conduct its investigation. In his reply of 22 October, the Director General stated that as the Panel had submitted no "element" establishing that there existed exceptional circumstances justifying such an extension of contract, he was not in a position to endorse the recommendation.

On 20 October 1997, the Under-Secretary-General for Internal Oversight Services wrote to the Applicant in connection with certain claims filed by her, advising her, inter alia, that the Office of Internal Oversight Services (OIOS) "*will* investigate reports from staff ... on mismanagment, misconduct and abuse of authority" and that any confusion over this issue was "merely a problem of communication"; that, in fact, OIOS had reviewed her claims but had determined that for an investigation to be conducted, she had to provide evidence with respect to how she had been personally affected by the alleged mismanagment; and, that OIOS had determined that no connection existed in relation to her contact with OIOS and the non-renewal of her fixed-term appointment. In her subsequent reply, the Applicant recalled that she had first contacted OIOS on 18 June 1997; noted that in the subsequent four months, despite several follow-up memoranda, none of the matters she brought to the attention of OIOS had been investigated; and, insisted that the lack of action on the part of OIOS had contributed to the non-renewal of her contract.

Also on 20 October, the JAB issued its report on the request for suspension of action. Finding no evidence of irreparable damage in the case, it made no recommendation in support of the request, and, on 21 October 1997, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the JAB's recommendation.

On 23 October 2003, the Applicant separated form service.

On 24 December 1997, the Applicant lodged an appeal with the JAB on the merits. The JAB submitted its report on 14 May 1998. Its considerations, conclusions and recommendations, and special remark read, in part, as follows:

> "**Considerations**
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> ...
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> 35. The Appellant's 1997 home leave approval involved an understanding, signed by the Appellant as early as July 1997, establishing the deduction of the Appellant's home leave travel should her contract not be renewed. The nature of this procedure is to clearly inform staff members of the possible consequences of their travel, if done prior to knowing whether their appointment is to be renewed or not. It is not to be viewed as a commitment for renewal and, in the Panel's opinion, it does not change the fact that employment with the Organization ceases on the expiration date of a fixed-term appointment.
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> 36. Furthermore, the Appellant relies on the fact that the same "routine procedure" took place in 1995. However, the Panel notes that in 1995, by memorandum 28 August, *i.e.* at least two weeks prior to her departure on home leave, the Appellant was informed that the prolongation of her contract was to be requested. No similar document existed for the 1997 home leave. The Panel is of the opinion that, in connection with her home leave, the Administration duly advised the Appellant who in turn took a decision and should bear the consequences of it.
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> 37. With respect to the Appellant's claims in connection with delays on the evaluation of her performance and the implementation of the PAS, the Panel ... does not find that the difficulties encountered amount to a lack of due process. Furthermore, the Panel underscores ... efficient or outstanding performance do not create a legal expectancy of renewal.
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> 38. With respect to the Appellant's claim of improper motive, prejudice and bad faith on the part of the Administration in connection with the non-renewal of her fixed-term appointment, the Panel ... considers that the Appellant has not submitted satisfactory and sufficient evidence in this connection. The Panel therefore finds no grounds to support the Appellant's claim.
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> 39. With respect to the Appellant's claim in connection with the reason given ... for the non-renewal of her fixed-term appointment, the Panel makes the following observations. The Appellant was indeed given a reason by her supervisor, namely ...'failure to adapt to the office environment'. ... [T]he reason put forward by the Appellant's supervisor constitutes a managerial matter where the Panel cannot substitute its judgment for that of the supervisor.
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> 40. With respect to the Appellant's argument that the absence of an 'acceptable' reason justifying her non-renewal shows that her contacting OIOS is the primary ground for the contested administrative decision, the Panel finds no evidence supporting this claim and considers that filing a complaint with OIOS cannot be construed *per se* as a safeguard against the non-renewal of appointments.

41. Finally, with respect to the argument in connection with the recruitment of temporary staff, the Panel notes that 'if, on the expiry of the contract, the vacant post is filled by another person - whatever be the reason for such appointment - that cannot constitute an abuse or deviation of power".

Conclusions and recommendations

42. For the foregoing reasons, the Panel recommends to the Secretary-General that the present appeal be rejected.

Special remark

43. Although the file suggests the existence of interpersonal and managerial difficulties in the Appellant's section, it is not within the Panel's authority to look into those matters. In addition, the panel notes that a claim in that regard was presented to the Panel on Discrimination and other Grievances but, unfortunately, it appears no investigation took place.

44. ... [T]he Panel believes that the possible problems ... are worth being inquired into and recommends to the Secretary-general to undertake the necessary actions towards that end."

On 10 July 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had decided to accept the Panel's recommendation, and, accordingly, to take no action in her case.

On 31 January 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The absence of an investigation into grievances filed while the Applicant was a staff member deprived her of an important protection and constituted a lack of due process.

2. The decision not to renew the appointment was based on a procedure that was not complete, fair, or reasonable; lacking in proper motive; and tainted by prejudice.

3. Proper procedures were not followed and this caused serious injury to the Applicant. Bad faith was exhibited in the administration of personnel policies and management of staff.

4. The JAB did not act as an independent and impartial tribunal, as specified in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, when rejecting the appeal. Therefore its recommendation should not be considered valid.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization under her fixed-term appointment.

2. The decision not to renew the Applicant's fixed-term contract was not vitiated by bias or other extraneous factors.

3. The Applicant was not denied due process by the relevant bodies which considered her grievances.

The Tribunal, having deliberated from 23 October to 17 November 2003, now pronounces the following Judgement:

I. It is a well-established rule of the internal law of the United Nations that fixed-term contracts carry no expectancy of renewal. However, the Tribunal has consistently held that such an expectancy may be created by countervailing circumstances, such as violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. (See Judgements No. 981, *Masri* (2000); No. 614, *Hunde* (1993).)

In the present case, the Administration would have acted within its discretion had it not based its decision not to renew on her supervisor's statement that she failed "to adapt to the office environment", which was communicated to the Applicant. Her post was not abolished at the expiration of her contract. On the contrary, she was immediately replaced by a temporary staff member - past retirement age and living in England - after the Applicant had been told that her offer to free-lance locally was rejected due to "no need".

II. The JAB did not go into the circumstances relating to the non-renewal of the Applicant's contract, as it considered them to be "managerial matters", not within its competence, and that it could not substitute its judgement for that of the Applicant's supervisor. The Tribunal cannot but completely disagree with the JAB's point of view. The Tribunal must now examine the issue, and in doing so, is not substituting its own judgment for that of the Administration. Indeed, the Tribunal is doing what is necessary to determine whether or not the contested decision was tainted by arbitrariness, lack of due process, discrimination, or some other improper motivation, and this can only be done by reviewing exactly those issues the JAB considered "managerial matters". As the Tribunal has held in Judgement No. 885, *Handelsman* (1998), the Respondent's exercise of his discretionary power in not extending a ...

contract must not be tainted by forms of abuse of power ..." In short, the reason advanced by the Administration for failure to renew a contract must of necessity have foundation in fact, and cannot be frivoulous.

III. The Tribunal is satisfied that the decision not to renew the Applicant's contract was the result of maneuvering by her second supervisor, who led the Administration to believe that she was, indeed, a "square peg in a round hole" and that the Administration would be much better off without her services. The second supervisor had, prior to the above machinations, acted improperly by lowering the ratings in the Applicant's PER for the period 24 October 1993 to 31 August 1995, given to her by her former (the first) supervisor, even though the first supervisor had been in charge for a period of 17 months and the second supervisor for only five months. The Applicant successfully rebutted that PER and her original ratings were restored. The Rebuttal Panel found that the second supervisor was unable to justify the lowering of the ratings in the PER. The reason advanced by the second supervisor, namely the Applicant's failure to "adapt to the office environment" was not considered sufficient or convincing.

IV. Moreover, the second supervisor's allegation, vague as it was, runs counter to the appraisal by the first supervisor, who affirmed that the Applicant treated her colleagues with respect, and by the fact that the Applicant's colleagues when questioned by the Rebuttal Panel effusively praised her work and inter-personal skills. Moreover, the Applicant was never given the opportunity to rebut the allegation, nor was it included in her final performance appraisal. In fact, the Applicant was never informed that she failed to adapt to the office environment or that that allegation had been identified as a possible cause for her non-renewal. The Tribunal is satisfied that due process of law was violated by the general lack of good faith demonstrated by the Administration in this respect.

V. The wrongs committed by the Administration do not stop there. The Applicant made two last-minute efforts to correct her situation immediately prior to the expiration of her contract. She filed a complaint with the OIOS claiming "mismanagement, waste of resources, abuse of authority misconduct and fraud as they pertained to her unit" which had a rather unorthodox follow up. At the suggestion of an OIOS investigator, they met in a bar in order for him to receive the Applicant's full report in confidence. Apparently, there was no furhter follow-up for months, the

Applicant was misled as to the real competence of the OIOS, and she was given the correct information by the Under-Secretary-General, OIOS, only two days before the expiration of her contract, when she had no possibility of continuing with her case.

The other effort was an appeal to the Panel on Discrimination and other Grievances. The Panel, in view of the very short term - one week - remaining for it to make an investigation, recommended a two-months extension of the Applicant's fixed-term contract. The Director General, UNOG, found that there were no "extraordinary circumstances" as required by ST/AI/308/Rev.1 and that the Applicant's "right to due process shall be fully respected and that she will be given access to all pertinent documents, regardless of her contractual status or of her location". The preliminary investigation was closed after the Applicant left the Organization.

The Tribunal finds that the lack of action on the part of the Administration on both counts indicates a desire to hasten the Applicant's departure from the Organization rather than to bring the ongoing investigations to a proper conclusion.

VI. The Tribunal also notes that the Applicant claims that she was unfairly requested to refund home-leave payments made by the Organization, on the ground that she did not continue in her post six months following her home leave, as required. The Tribunal concurs with the finding of the JAB that the Administration duly advised the Applicant who in turn took a decision and should now bear the consequences.

VII. In conclusion, the Tribunal finds that the procedural steps taken in order to reach the decision not to renew the Applicant's contract as well as the obstacles put in the way of concluding the investigations by the OIOS and the Grievance Panel constituted a violation of the Applicant's due process rights for which she must be compensated. The Tribunal also notes and supports the recommendation made by the JAB in this regard "that the possible problems in the [Applicant's] section are worth being inquired into" and that "the Secretary-General ... undertake the necessary actions towards that end".

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of six months' net base salary; and

2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Mayer **Gabay**
Vice-President

Spyridon **Flogaitis**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary